IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

WILLIAM H. KILLOREN, Trustee in Bankruptcy of Hamilton-Brown Shoe Company, a Corporation, Bankrupt, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The District Court rendered no opinion; its order appears on Page 130 of the Record.

The opinion of the Circuit Court of Appeals reversing this order will be reported in 122 F. (2d) 609. (See Adv. Sheets October 27, 1941.) It was filed on September 3, 1941, and appears at Page 161 in the Record.

JURISDICTION.

Reference is made to the jurisdictional statement contained in the petition in this Court.

STATEMENT OF THE CASE.

Reference is made to the Summary Statement of the Matter Involved, contained in the petition.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that the filing of a claim on behalf of the individual employees in the estate of a bankrupt employer would tend to effectuate the policies of the National Labor Relations Act. The Court overlooked the decisions of this Court to the effect that the purpose of that act was to effectuate a public policy rather than to protect private rights.

2. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that the order of that Court, entered after the proceedings in the Bankruptcy Court were instituted, created a provable debt in bankruptcy.

3. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that because the National Labor Relations Board alone is authorized to enforce the obligations of a public character created by the National Labor Relations Act, the Board's status is that of a plenary trusteeship for the employees as individuals, and that the Board is authorized to take such steps as in its opinion are necessary to protect the private rights of such employees.

4. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that the National Labor Relations Board is a "creditor" as defined by the Bankruptcy Act.

5. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that the amount of the back pay award was ascertainable, whereas the liability had not been determined at the time of bankruptcy and was not ascertainable. The Court overlooked the decision of this Court in *Zavelo v. Reeves,* 227 U. S. 625, 57 L. Ed. 676, 33 S. Ct.

365, to the effect that a claim, to be provable in bankruptcy, must exist at the time of bankruptcy.

6. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that the claim of the National Labor Relations Board is entitled to the priority given wage claims under Section 64 of the Bankruptcy Act, and that the amount of the claim represents "wages earned."

7. The Circuit Court of Appeals, Eighth Circuit, erred in overlooking the decision of this Court in *National Labor Relations Board v. Jones and Laughlin S. Corp.*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, wherein this Court held that it is the duty of the Courts to adopt a construction of the National Labor Relations Act that would avoid unconstitutional procedure. The decision of the Circuit Court of Appeals permits and sanctions an unlawful delegation of legislative power to the National Labor Relations Board in violation of Section 1 of Article I of the Constitution of the United States, and in violation of the Seventh and Tenth Amendments to the Constitution, and such an interpretation of the Act should be avoided.

SUMMARY OF ARGUMENT.

POINT A.

The purposes of the National Labor Relations Act are public purposes. The opinion and decree of the Circuit Court of Appeals to the effect that an important purpose was to protect the economic status of employees, and that the Act creates private rights or authorizes the creation of private rights for the purpose of protecting employees, is contrary to the decisions of this Court.

POINT B.

The opinion and decree of the Circuit Court of Appeals construes the order of that Court, affirming and directing payment of a back pay award, as creating a definite and enforceable obligation against the employer. Since the order of the Court was rendered subsequent to the filing of the petition in these proceedings, the decision here appealed from is contrary to the holdings of this Court.

POINT C.

There is no statutory basis for the finding and conclusion of the Circuit Court of Appeals that the status of the National Labor Relations Board is one of plenary trusteeship for employees.

POINT D.

The opinion and decree of the Circuit Court of Appeals arbitrarily gives to the back pay awards the status of wages earned, for which conclusion there is no statutory basis.

POINT E.

The Courts should adopt a construction of the National Labor Relations Act that would avoid unconstitutional procedure.

ARGUMENT.

POINT A.

The purposes of the National Labor Relations Act are public purposes. The opinion and decree of the Circuit Court of Appeals to the effect that an important purpose was to protect the economic status of employees, and that the Act creates private rights or authorizes the creation of private rights, for the purpose of protecting employees, is contrary to the decisions of this Court.

The philosophy of the Court below as evidenced in the majority opinion, is a unique one. There has been much recent legislation enacted for the purpose of the protection of wage earners, and to create private rights in favor of individual employees; but the Courts have uniformly interpreted the National Labor Relations Act to constitute legislation enacted for public as distinguished from private purposes. The Act itself contains a statement of its purposes. The President in approving it issued a formal statement in which he defines the purposes of the Act as he understood them. This Court has in various cases necessarily stated the purposes of the Act at some length. We do not find either in the proceedings before Congress, or in the decisions, the thought that the right of remedial action conferred by the Act on the National Labor Relations Board was created for the purpose of vindicating private rights. Had Congress intended to protect private interests, it would have been indeed simple for Congress to have stated so either in the preamble to the Act or in the specific provisions thereof, or in both.

The filing and allowance of a claim in bankruptcy is in furtherance of the private rights of a creditor. The Bankruptcy Act defines the term "Creditor," and the right to file a claim in bankruptcy is limited by the Bankruptcy

Act. The allowance of a claim in bankruptcy is the recognition of a private right. The opinion of the Circuit Court of Appeals can conceivably serve no public purpose. In so far as it seeks the restoration of the economic status quo of the employees, it seeks to vindicate private rights and is contrary in that respect to the following decisions of this Court. *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615; *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 81 L. Ed. 953, 57 S. Ct. 650; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 82 L. Ed. 638, 40 S. Ct. 459; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569; *Washington, V. & M. C. Co. v. National Labor Relations Board*, 301 U. S. 142, 81 L. Ed. 965, 57 S. Ct. 648; *Republic Steel Corp. v. National Labor Relations Board*, 311 U. S. 7, 61 S. Ct. 77, 85 L. Ed. Adv. Ops., p. 1.

The majority opinion does suggest that a public purpose will be served by permitting the filing of a claim. We refer to the statement that "public policy cannot permit such a valid order of the Board to be thwarted or escaped, if there is any sound way to prevent it." The decision seems to assume that an employer might go into bankruptcy to escape the effect of a back pay award, and that his purpose would be aided by the denial of the right to file a claim based upon that award. But it would appear that the contrary is true. In the first place, the burden of the back pay award in a bankruptcy case will not fall upon the employer, but upon the employer's creditors. In the case at bar, it so happens that in all likelihood that burden will fall upon the holders of tax claims and upon the holders of claims for wages actually earned. The bankrupt, being defunct, is indifferent.

The function of an award of pay back is to effectuate the policies of the National Labor Relations Act in preventing

an obstruction to the free flow of interstate commerce. With bankruptcy all flow of commerce ceased, so far as the bankrupt was concerned, and nothing could be effectuated by the allowance of a claim; the only effect would be to penalize innocent creditors.

A more serious consequence of the allowance of the claim will be the discharge from the claim that is given to provable debts in bankruptcy. See Bankruptcy Act of 1898, as amended, Section 17 (11 U. S. C. A., Section 35).* Thus an employer will under the decision below be enabled, except to a limited extent, to escape a back pay award, whether a claim is filed or not, by filing a petition in bankruptcy. This will tend to thwart rather than to effectuate the public policy of the Act.

POINT B.

The opinion and decree of the Circuit Court of Appeals construes the order of that Court, affirming and directing payment of a back pay award, as creating a definite and enforceable obligation against the employer. Since the order of the Court was rendered subsequent to the filing of the petition in these proceedings, the decision here appealed from is contrary to the holdings of this Court.

The majority opinion below directly holds that the order of the Eighth Circuit Court of Appeals directing payment of the back pay award stamped the back pay award as a definite and enforceable obligation against the Hamilton-Brown Shoe Company. The enforcement order of the Eighth Circuit Court of Appeals was rendered on May 29, 1939. The petition for corporate reorganization had been previously filed, to wit, on April 17, 1939. This Court has held that provable debts in bankruptcy are such only as existed at the time of bankruptcy. *Zavelo v. Reeves*, 227 U. S. 625, 57 L. Ed. 676, 33 S. Ct. 365.

* See Appendix B.

POINT C.

There is no statutory basis for the finding and conclusion of the Circuit Court of Appeals that the status of the National Labor Relations Board is one of plenary trusteeship for employees.

The Circuit Court of Appeals in its decision gave the National Labor Relations Board the status of a plenary trusteeship. This holding seems to be based upon a practice of the Board to receive and distribute back pay awards. There is no statutory basis for such a conclusion. The Board is accordingly included as a creditor within the definition of Section 1 (11), 11 U. S. C. A., Section 1 (11), providing that a " 'Creditor' shall include anyone who holds a debt, demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy." The opinion provides, however, for the allowance of the separate claims of the individual wage earners, the priority to be given to each claimant to depend upon the facts respecting the status of each individual employee. In other words, at one point in the decision the creditor is the Board; at another point the individual employees are regarded as creditors.

The National Labor Relations Act affords no basis for the concept of a plenary trusteeship analogous to the guardianship of the United States over Indian tribes.

POINT D.

The opinion and decree of the Circuit Court of Appeals arbitrarily gives to the back pay awards the status of wages earned, for which conclusion there is no statutory basis.

Respondent contended that its claim should be given the priority due the United States under Section 64a (5) of

the Bankruptcy Act [Title 11, U. S. C. A. 104a (5)]. Petitioner contended that there is no provision either in the National Labor Relations Act or in the Bankruptcy Act for the granting of priority status to a back pay award. On the theory that such an award created a liability for wages constructively earned, the Circuit Court of Appeals decided that the claim of each wage earner should be given the priority provided by the Bankruptcy Act, in Section 64a (2) [Title 11, U. S. C. A. 104a (2)]. It is, we urge, a strained construction of language to designate such an award as "wages earned." If it is to be held that the National Labor Relations Act created a private right, then that right is the nature of a claim for damages and as such is not entitled to priority of payment.

The Chandler Act (Act of June 22, 1931, C. 575, 52 Stat. 840, 11 U. S. C. A., Section 1 et seq.), revising generally the Bankruptcy Act, was enacted in 1938. At that time the propriety of back pay awards had been considered in many cases. Congress, although revising and liberalizing Section 64 of the Bankruptcy Act and even liberalizing the provisions respecting preferred wage claims, made no provision for the allowance of back pay awards as priority claims.* We submit that the Circuit Court of Appeals erred in so doing.

POINT E.

The Courts should adopt a construction of the National Labor Relations Act that would avoid unconstitutional procedure.

The decision of the Eighth Circuit Court of Appeals assumes that petitioner here is challenging the constitutionality of the National Labor Relations Act. But peti-

* For Section 64 after the passage of the Chandler Act, see Appendix D; for section 64 prior to the Chandler Act, see Appendix E.

tioner has not done so. The constitutionality of the Act is beyond question. The decision of this Court in the case of *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, clearly upheld the constitutionality of the Act and went further. The Court pointed out that a construction of the Act which would render it unconstitutional should be avoided. We maintain that the construction placed upon the Act by respondent here, and by the Circuit Court of Appeals in its decision, places a construction upon the Act which would render it unconstitutional, and that therefore the decision is contrary to the *Jones & Laughlin* case.

We say that such a construction permits the National Labor Relations Board, in its discretion, to create a provable claim in bankruptcy and to establish and enforce private rights of employees, where no such liability has been provided by Congress. The fixation of a liability is discretionary, because the Board is not required to make an award of back pay. If the Act were to be so interpreted, then in that event it would have to be declared unconstitutional as permitting an unlawful delegation of legislative authority contrary to Section 1 of Article I of the Constitution, contrary to the decisions of this Court. *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837. *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160, 56 S. Ct. 855. It is accordingly our contention, not that the Act is unconstitutional, but that, as pointed out in the *Jones & Laughlin* case, any interpretation of the Act which might render it unconstitutional should be avoided; and that the interpretation placed upon the Act by the Circuit Court of Appeals would involve an unconstitutional delegation of legislative authority. The Court has in its opinion failed to follow the *Jones & Laughlin* case.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers. To such end, a writ of certiorari should be granted so that this Court may review the decision of the Eighth Circuit Court of Appeals and finally reverse it.

Respectfully submitted,

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